SUBJECT INDEX

		Page
I.	Citations to Opinions Below	2
II.	Jurisdiction	2
III.	Constitutional Provision Conferring Jurisdiction	2
IV.	Questions Presented	3
V.	Statement of Case	3
VI.	Argument	4
	1. There Is No Federal Question Properly Reviewable By This Court	4
	2. The State Ground For Denial of Petition for Rehearing	5
	3. Petitioners Were Not Denied Due Process of Law	6
	4. Petitioners Were Not Deprived of the Opportunity to Join Third Party Defendants	8
VII.	Conclusion	9

TABLES OF AUTHORITY

Table of Cases

	Page
Allen v. Arguimbau, 198 U.S. 149	5
Durley v. Mayo, 351 U.S. 277 (1956)	4
Honeyman v. Hanan, 300 U.S. 14	5
Klinger v. Missouri, 13 Wall 257	5
Lynch v. New York, 293 U.S. 52	5
Maynard Investment Co., Inc., v. McCann, 77 Wn. 2d 616, 465 P.2d 657 (1970)	6, 7, 8
Stembridge v. Georgia, 343 U.S. 541	5
Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293	5

Texts

50 Am. Jur. 2d *Appeal and Error* §§549-49, 551 (1962)	6, 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1348

MRS. JACOB SIEGLER, Individually and as
Administratrix of the Estate of
Carol J. House, Deceased.
Respondent,

v.

AARON KUHLMAN AND "JANE DOE" KUHLMAN,
Husband and Wife,

and

PACIFIC INTERMOUNTAIN EXPRESS CO., A Corporation,
Petitioners.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I.

CITATIONS TO OPINIONS BELOW

The citations to opinions of courts below set forth in the Petition for a Writ of Certiorari filed herein are correct with the addition of the following:

The Order of the Supreme Court of the State of Washington denying Petitioners' Petition for Rehearing was entered without opinion on January 4, 1973 and is presently unpublished, but a copy of said order is annexed to the Petition for a Writ of Certiorari filed herein as Appendix "D".

II.

JURISDICTION

There has been no violation of any title, rights, privileges or immunities under the Constitution of the United States, as set up and claimed by Petitioners in their Petition for a Writ of Certiorari to this Court, and there is therefore no basis for the assumption by this Honorable Court of jurisdiction in this cause.

III.

CONSTITUTIONAL PROVISION CONFERRING JURISDICTION

Amendment XIV, Section 1 of the Constitution of the United States is correctly set forth by the Petitioners in the Petition for a Writ of Certiorari, but as shown herein, that provision does not provide a proper basis for the assumption of jurisdiction by this Honorable Court.

IV.

QUESTION PRESENTED

Does the order denying the Petition for Rehearing entered by the Supreme Court of the State of Washington on January 4, 1973, raise a substantial federal constitutional issue warranting review by this Court?

V.

STATEMENT OF CASE

The Petitioners' statement of the case is accurate but incomplete. Respondent (Plaintiff below) supplements that statement as follows:

Petitioners' gasoline tank trailer became detached from its tractor while traveling westerly on a road underpassing Interstate Highway 5. The trailer crashed through a dividing fence onto a parallel road below in the underpass. Respondent's 17 year old daughter traveling easterly at about the same time came upon the trailer spewing gasoline upon the road. The gasoline ignited and she was killed in the holocast which followed.

The Petitioner took possession of the remains of the trailer immediately after the fire. A portion of the springs from the gasoline tank trailer, which Respondent deems critical evidence, was delivered by the Petitioners to their expert for examination. These items disappeared while in the possession of Petitioners' expert and were never available for examination by the Respondent or her experts.

At the trial of this action, Respondent requested the Court to instruct the jury that the Petitioners (Defendants below) were liable as a matter of law.

The Washington Supreme Court held (1) That the trial court erred in refusing to instruct the jury on the issue of *res ipsa loquitur*, and (2) That the Petitioners were liable as a matter of law on the theory of strict liability of carriers of highly dangerous substances. (A-6, A-7 and A-15, Petition for a Writ of Certiorari).

VI

ARGUMENT

1. There Is No Federal Question Properly Reviewable By This Court.

The federal questions asserted by the Petitioners in their Petition to this Honorable Court for review by certiorari were raised by their Petition for Rehearing filed with the Washington Supreme Court. As noted above, that Petition was denied by the order of the Washington Supreme Court entered on January 4, 1973, without opinion. (*See* Appendix "D", Petition for a Writ of Certiorari).

Assuming, arguendo only, that by its decision of November 15, 1972, the Washington Supreme Court violated its own procedural rules and that such action raised a federal question, the Petition for a Writ of Certiorari should nevertheless be denied because the final order of the Washington Supreme Court entered January 4, 1973 could rest upon state grounds.

Where the highest court of the state enters a decision without opinion which may be based either upon a state or federal ground, this Court will not review the decision if the state ground is sufficient to sustain the decision. This Court in *Durley v. Mayo*, 351 U.S. 277 (1956) states in part at page 281 as follows:

"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547.

'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan*, 300 U.S. 14, 18; *Lynch v. New York* 293 U.S. 52. *And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri*, 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U.S. 293, 297; *Allen v. Arguimbau*, 198 U.S. 149, 154-155; *Lynch v. New York, supra* . . .'"

(Emphasis supplied.)

Accordingly, Respondent submits that the first determination this Court must make is whether or not there was a state ground upon which the Washington Supreme Court could properly deny the Petition for Rehearing filed therein. Respondent respectfully submits there was.

2. The State Ground For Denial of Petition for Rehearing.

As previously noted, in its decision of November 15, 1972, the Washington Supreme Court held that the trial court erred in failing to instruct the jury on the law of *res ipsa loquitur*. This ground upon which the decision was based required that the lower court's

decision be reversed and the case remanded for a new trial.

The Respondent at the trial requested a directed verdict on the issue of liability. Accordingly, at retrial, under the rule of strict liability as announced by the Washington Supreme Court which would then be before the trial court, Respondent would be entitled to an instruction that the Petitioners are liable as a matter of law on the facts of this case. It is entirely appropriate, to avoid a multiplicity of appeals, for the Washington Supreme Court to rule upon questions which would be involved on a retrial. *See Maynard Investment Co., Inc. v. McCann*, 77 Wn.2d 616, 622, 465 P.2d 657 (1970) wherein the following language from 5 Am. Jur. 2d *Appeal and Error* § 548 is quoted and recognized as the law of the State of Washington:

> ". . . Where a new trial is ordered, the appellate court may consider questions not technically before it which will arise on a new trial, especially where they may be decisive. . ."

By its determination of the applicability of the rule of strict liability to the facts of this case, the Washington Supreme Court merely announced the law that would be applicable upon retrial and thereby avoided a subsequent appeal on the issue of liability.

3. Petitioners Were Not Denied Due Process of Law.

The Petitioners claim that the Washington Supreme Court "violated" its own procedural "rule" to the effect that a theory which was not advanced at the trial cannot be considered on appeal, and that thereby, they

have been deprived of property without due process of law.

The Petitioners failed to cite to this Honorable Court the Washington case of *Maynard Investment Co., Inc. v. McCann, supra.* At pages 621-622, the Washington Supreme Court stated in part as follows:

> "Normally the rule is that an issue or theory not presented to the trial court will not be considered by the Supreme Court for the first time on appeal. However, this rule is not inexorable and has its limitations. . . .
>
> In 5 Am. Jur 2d *Appeal and Error* §§ 548-549, 551 (1962), it is said:
>
> . . . Where a new trial is ordered, the appellate court may consider questions not technically before it which will arise on a new trial, especially where they may be decisive. Questions necessarily involved in issues raised and litigated in the trial court are open for consideration on appeal or review, even though they were not specifically raised below.
>
> A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. . ."

After citing the rules from American Jurisprudence 2d, set forth in part above, the Washington Court in *Maynard, supra,* on page 623, states as follows:

> "The exception to the rule is a salutary one. Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this

court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it."

Thus, the law of the State of Washington as announced by the Washington Supreme Court is that an issue may be raised for the first time on appeal if necessary to serve the ends of substantial justice, and in such cases, in fact, may be raised by the court sua sponte.

Therefore, under the Washington rule, as set forth in *Maynard Investment Co., Inc., v. McCann, supra,* there has been no denial of procedural due process to the Petitioners, even if the federal questions raised by Petitioners were substantial and proper before this Honorable Court.

4. Petitioners Were Not Deprived of The Opportunity to Join Third Party Defendants.

The Petitioners' contention that they have been deprived of an opportunity to join third parties is without merit. The issues joined in the trial of this action were such that the defense could have been tendered to third parties had the Petitioners chosen to do so. The physical evidence most critical to the determination of third party liability in connection with this case (the broken springs) was within the exclusive control of the Petitioners until they lost the same. Although Petitioners had the right and opportunity to join third parties, who they now claim may have been responsible for the separation of the gasoline tank trailer from its tractor, either before or after they lost the physical evidence, they made no effort to do so.

The decision of the Washington Supreme Court

which is annexed to the Petition for a Writ of Certiorari as Appendix "A" announced that the rule of strict liability is applicable to persons engaging in an abnormally dangerous activity, and that the hauling of gasoline was such an activity. The Washington Supreme Court did not state that the rule of strict liability was applicable to the activity of constructing tractors, tanks, trailers or couplings.

VII

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied because (1) there is no substantial federal issue presented which would invoke the jurisdiction of this court and (2) even if the jurisdiction of the court were properly invoked, there has been no deprivation of Petitioners' property without due process of law.

DATED at Olympia, Washington, this 12th day of April, 1973.

Respectfully Submitted,

FRISTOE, TAYLOR & SCHULTZ, Ltd., P.S.

By: E. ROBERT TAYLOR

DON W. TAYLOR

THEODORE D. SCHULTZ

Attorneys for Respondent